Flambeau Airmold Corporation *and* Union of Needletrades, Industrial, and Textile Employees, AFL–CIO, CLC. Cases 11–CA–17172, 11–CA–17385, and 11–CA–17537

August 1, 2002

ORDER GRANTING GENERAL COUNSEL'S MOTION AND DENYING THE UNION'S MOTION

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On May 30, 2001, the National Labor Relations Board issued a Decision and Order[1] finding, inter alia, that the Respondent had violated Section 8(a)(5) and (1) of the Act by making numerous unilateral changes in employees' terms and conditions of employment, including increasing the amount of employee contributions for health insurance premiums effective February 2, 1997, and eliminating all material handler positions, five maintenance helper positions, and its tool maker apprenticeship program.

On July 2, 2001, the Charging Party Union filed a "Motion to NLRB to Clarify and Modify Decision." The Union asserted that the Respondent had again unilaterally increased employee health insurance payments in both 1998 and 1999. The Union had requested that the Region's compliance officer include the 1998 and 1999 increases in the backpay calculations to remedy the Respondent's unfair labor practice violations. By letter dated June 26, 2001, the compliance officer denied the Union's request. In response, the Union has requested that the Board clarify and amend its Decision and Order to provide for the litigation of the Respondent's alleged 1998 and 1999 increases in the unit employees' health insurance payments during the compliance stage of this proceeding.

Thereafter, on September 20, 2001, the General Counsel filed a "Motion to Modify Order to Include a Make Whole Remedy" to provide a make-whole provision for the Respondent's 8(a)(5) and (1) violation in unilaterally eliminating material handler positions, five maintenance helper positions, and its tool maker apprenticeship program. The General Counsel asserted that the judge and the Board inadvertently had failed to include such an order and requested that the Board modify its Order accordingly.

On October 2, 2001, the Board issued a Notice to Show Cause why both the Union's and the General Counsel's motions should not be granted. The Respondent filed a response to the Notice to Show Cause. Thereafter, the Union requested leave to file a reply brief, which the Board accepted.

After considering the entire record and the arguments that the parties raise here, we have to decided to grant the General Counsel's unopposed motion, but deny the Union's motion because the Board's established policy does not permit subsequent unfair labor practices to be litigated during the compliance stage of the proceeding.[2]

1. Regarding the General Counsel's motion, the Respondent does not contest the applicability of the make-whole remedy sought by the General Counsel to the job classifications that the Respondent unlawfully eliminated. The Respondent requests, however, that the Board allow it the right to dispute at the compliance stage of this proceeding the accuracy of the Board's findings that these job classifications actually existed, as well as the identities of employees who suffered losses as a result of any unilateral change.

In granting the General Counsel's motion, we shall not permit the Respondent to relitigate in compliance the issue of whether unit employees, in fact, had worked in the job classifications described above so that the Respondent's elimination of them constituted an unlawful unilateral change. The Board clearly decided the matter against the Respondent in its earlier decision finding this violation. We shall allow the Respondent to challenge the identities of the employees who held these jobs because the Board has made no finding on this issue.

2. Regarding its motion to clarify and modify, the Union has contended that "in furtherance of administrative economy" the Board should amend its earlier decision to allow for litigation during compliance of its allegation that the Respondent further violated the Act by increasing employees' health insurance contributions during 1998 and 1999. To support its motion, the Union relies particularly on *Operating Engineers Local 925 (J. L. Manta, Inc.)*, 168 NLRB 818 (1967), supplemented by 180 NLRB 759 (1970), enfd. in relevant part 460 F.2d 589, 600–601 (5th Cir. 1972), in which the Board amended its prior decision to require that the respondent union in that case reimburse the discriminatee for acts of hiring hall discrimination that occurred after the close of the unfair labor practice hearing.

The Respondent, in its response to the Notice to Show Cause, points out, citing *Ironworkers Local 373 (Building Contractors Assn. of New Jersey)*, 295 NLRB 648, 650 (1989), enfd. 70 F.3d 1256 (3d Cir. 1995), that the general rule is that the Board does not permit subsequent unfair labor practice allegations to be litigated during

[1] 334 NLRB 165

[2] We shall also modify the recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

compliance proceedings. The Respondent argues that, because any charges relating to events that took place during 1998 and 1999 would be barred on timeliness grounds by Section 10(b) of the Act, the Union is attempting to bypass the liability phase for these alleged unfair labor practices and have them litigated as part of the compliance proceeding here. Contrary to the Union, the Respondent asserts that *Operating Engineers Local 925* is distinguishable from the present case because the Board interpreted the make-whole remedy there "as applying *prospectively* and to acts that occurred *after* the original hearing." (Emphasis in original.) In reply, the Union contends that the Respondent's attempt to distinguish *Operating Engineers Local 925* is misplaced. The Union asserts that the decision in that case is apposite here because it permitted the litigation of alleged violations in compliance that were closely related to the timely charges decided in the unfair labor practice proceeding. The Union also notes that in both *American Electric Power Co.*, 302 NLRB 1021 at fn. 1 (1991), enfd. 976 F.2d 725 (4th Cir. 1992), and *Davis Electrical Constructors*, 291 NLRB 115, 116–117 (1988), the Board held "that [Section] 10(b) does not bar the amendment of a complaint to reflect violations not charged but involving conduct identical to and occurring later than conduct that was the subject of a timely charge."

It is well established, as the Respondent has noted, that "[o]nce the Board has found a violation of the Act, it usually does not permit subsequent unfair labor practice allegations to be litigated in compliance proceedings."[3] The affected party has the obligation, on learning that the unlawful activity appears to be continuing or resuming, to file another charge so that the General Counsel can make a merit determination and, if necessary, issue an additional complaint covering the new unfair labor practice allegations. Section 10(b), however, does establish the limitations period barring any complaint based on unfair labor practices occurring more than 6 months before the filing of the charge. That period does not begin to run on the alleged unfair labor practices until the affected party is put on notice, actually or constructively, of the acts constituting the alleged violations.[4]

Although the Board in *Operating Engineers Local 925* departed from its usual practice and modified its earlier Order to provide specifically for backpay relief concerning alleged discrimination that occurred after the hearing, we find no reason to make a similar exception to our general policy in this case. We note that the Fifth Circuit, in enforcing the Board's backpay determination there, noted with approval that the backpay specification included "specific alleged unfair labor practices occurring subsequent to the close of the [unfair labor practice] hearings."[5] The court concluded that, because the compliance specification set out the additional unfair labor practices alleged, the specification was tantamount to a new complaint and should be treated as such.[6] By contrast, the General Counsel in this proceeding has stated that the compliance specification will not permit any recovery of the Respondent's purported increases in the unit employees' health insurance contributions during 1998 and 1999. The present situation, therefore, is clearly distinguishable from *Operating Engineers Local 925* because the General Counsel in this case does not seek to have additional violations found in compliance.[7] Thus, even assuming we were inclined to deviate from our established policy of not permitting the litigation of alleged unfair labor practices in compliance, we recognize that it is the General Counsel who has broad authority under Section 3(d) of the Act to initiate and prosecute complaints in unfair labor practice proceedings.[8] The Board would be usurping the General Counsel's statutory authority if we directed him to consider during compliance, as the Union has urged, the additional alleged violations regarding the 1998 and 1999 increases in employee contributions. For these reasons, we deny the Union's motion to clarify and amend our original decision.[9]

[3] *Iron Workers Local 373*, supra at 650.

[4] *Burgess Construction*, 227 NLRB 765, 766 (1977), enfd. 596 F.2d 378 (9th Cir. 1979), cert. denied 444 U.S. 940 (1979).

[5] 460 F.2d at 600.

[6] Id. at 601.

[7] Although the dissent points out that the General Counsel has not opposed the Union's motion here, we find that the General Counsel's refusal to amend the compliance specification clearly reveals his position that recovery for the 1998 and 1999 increases is not appropriate in this proceeding.

[8] See, e.g., *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112 (1987).

[9] Our colleague claims that we have failed to restore the status quo ante by denying the Union the opportunity to litigate any subsequent increases in employees' health insurance contributions. We stress, however, that the Board's original decision adopts the judge's remedial order that requires, inter alia, the Respondent to "charge employees the same amount [for health insurance] as it did prior to 1997." The Board framed its Order in this manner because the record before the Board did not indicate that changes were made in 1998 and 1999. Assuming that there is no timely allegation that the 1998 and 1999 changes were unlawful, the Respondent will have the opportunity to show, in compliance proceedings, that the pre-February 2, 1997 conditions should be restored only until the lawful changes of 1998 and 1999, and employees should be made whole only for that period. Contrary to the dissent, we conclude that the Board's remedy does not justify the litigation in compliance of separate and distinct unfair labor practice allegations based on any increases that occurred during 1998 and 1999. We also disagree with our colleague's conclusion that the litigation of these alleged post-hearing increases would legitimately "serve administrative economy" in the present circumstances where the General Counsel has amended

ORDER

The General Counsel's motion to modify the Board's Order is granted, whereas the Union's motion to clarify and modify is denied. Accordingly, the Board's Order in the underlying decision (334 NLRB No. 16) is modified, and the Respondent, Flambeau Airmold Corporation, Weldon, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Add the following as paragraph 2(g) of the Order and reletter the subsequent paragraphs accordingly.

"(g) Make whole employees who formerly worked in material handler positions, maintenance helper positions, and the tool maker apprenticeship program for any loss of earnings they may have suffered as a result of the Respondent's unlawful elimination of their job classifications in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as provided by *New Horizons for the Retarded*, 283 NLRB 1173 (1987)."

2. Substitute the following for present paragraph 2(i) that has become paragraph 2(j) with the addition of the paragraph above.

"(j) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice to employees for that which issued on May 30, 2001.[10]

MEMBER LIEBMAN, dissenting in part.

The Charging Party, Union of Needletrades, Industrial, and Textile Employees, AFL–CIO, CLC (UNITE!), has moved for an order to clarify and modify the Board's Decision and Order of May 30, 2001, "to provide for make-whole relief for the Employer's continual violations of its obligation to bargain with the Union over increases in employee contributions for health insurance premiums." The Union seeks this clarification so that during compliance proceedings, the parties may litigate whether changes made in 1998 and 1999 similarly violated Section 8(a)(5) and, if so, what the appropriate remedy should be. My colleagues deny the Union's motion. In my view, it is not necessary for the Board to clarify its original Decision and Order as a means of facilitating the relief the Union seeks. The Board's original remedy cannot be fully effectuated without permitting the litigation of the 1998 and 1999 increases in the compliance phase. That is because the pre-February 1997 status quo ante cannot be restored without determining the legality of the intervening increases. This necessarily must be done in the compliance phase.

In its decision, the Board held that the Respondent violated Section 8(a)(5) and (1) by, among other things, unilaterally increasing employees' health care contributions in February 1997. The Board ordered the Respondent to cease and desist from "Refusing to bargain with [the Union] by unilaterally . . . increasing the amounts employees pay for health insurance." The Board also ordered the Respondent to "charge employees the same amount as it did prior to February 2, 1997," and to "Make whole all employees affected by the increased amounts they paid for health insurance." Further, the Board ordered the Respondent to "Notify and give the Union an opportunity to bargain before making any change in terms and conditions of employment of unit employees."

The Union's motion to clarify alleges that, following the close of the unfair labor practice hearing, the Respondent in 1998 and 1999 again unilaterally increased the amounts employees contribute to the cost of their health insurance. In support of its motion to clarify, the Union relies on *Operating Engineers Local 925*, 168 NLRB 818 (1967), subsequent proceedings 180 NLRB 759 (1970), enfd. in relevant part 460 F.2d 589 (5th Cir. 1972). In that case, the Board amended its decision, in which it found that the respondent union had committed hiring hall violations, to allow the General Counsel in compliance to seek a remedy for the union's alleged posthearing continuation of its unlawful hiring-hall practices. The Board, of course, cautioned that the "General Counsel must necessarily prove that any claimed losses of wages . . . resulted from discriminatory refusals to refer [the Charging Party]." The Union here seeks a similar opportunity for the General Counsel to establish the Respondent's continued unilateral increases in employees' health care contributions and obtain appropriate relief.

The majority denies the Union's motion largely "because the Board's established policy does not permit sub-

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neither the original complaint nor the compliance specification to include these alleged violations and where any new complaint raising them would be time barred by Sec. 10(b).

Chairman Hurtgen notes that the 1998 and 1999 increases were not contemplated by the 1997 charge. If they had been, they might well be recoverable in this proceeding. However, inasmuch as the 1998 and 1999 increases were new acts, they must be the subject of separate and timely charges.

[10] We shall include in the new notice the changes mandated by our recent decision in *Ishikawa Gasket American, Inc.*, 337 NLRB No. 29 (2001).

sequent unfair labor practices to be litigated during the compliance stage of the proceeding." In this case, however, rote application of this "established policy" makes no sense. More on point is that "in cases, like here, involving a violation of Section 8(a)(5) based on a respondent's unilaterally altering existing benefits, it is the Board's established policy to order restoration of the status quo ante to the extent feasible, and in the absence of evidence showing that to do so would impose an undue or unfair burden upon the respondent." *Allied Products Corp.*, 218 NLRB 1246 (1975), enfd. 548 F.2d 644 (6th Cir. 1977).

I do not understand how the Board's status quo ante remedy can fully be effectuated, or even accurately calculated, without allowing litigation of the intervening increases. As stated, the Board ordered the Respondent to "charge employees the same amount as it did prior to February 2, 1997," and to "make whole all employees affected by the increased amounts they paid for health insurance." The legality of the intervening increases would surely have to be taken into account if the pre-February 1997 status quo is to be restored. This remedy will be effectuated if the General Counsel, in compliance, is allowed to contest the validity of the 1998 and 1999 increases, which the Respondent presumably will assert as a basis for limiting its backpay liability.

Further, as the Union argues, allowing the parties to litigate the validity of the posthearing increases in compliance will serve administrative economy without imposing a significant burden on the parties or the judge. The Respondent has not disputed the fact of the alleged post-hearing increases or the Union's assertion that the increases were implemented without notice to and bargaining with the Union. Moreover, the Board has already considered and rejected the Respondent's contention that it had an established practice of unilaterally increasing employees' health care contributions. It thus appears that the judge could efficiently resolve whether the 1998 and 1999 increases were lawful.

Last, contrary to the Respondent's argument, the Union's allegations of posthearing increases are not time-barred under Section 10(b). The alleged posthearing violations are not merely closely related to the violations found by the Board; they are essentially identical. See *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959).

For all of these reasons, I find that the Board's Order implicitly permits litigation in the compliance stage, as sought by the Union.[1]

[1] I, of course, agree with the majority that the Board should not usurp the General Counsel's authority to initiate and prosecute complaints in unfair labor practice proceedings. At issue here, however, is the Board's statutory authority to take such action as will effectuate the policies of the Act. The Board has wide discretion in ordering affirmative relief to remedy violations of the Act, including orders to restore the status quo ante. Moreover, in this instance, while the compliance officer earlier denied the Union's request to amend the compliance specification, the General Counsel has not opposed the Union's motion.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT deal directly with our employees concerning their hours and working conditions.

WE WILL NOT refuse to bargain with the Union of Needletrades, Industrial, and Textile Employees, AFL–CIO, CLC, by unilaterally instituting and enforcing new time-clock rules and enforcing previously unenforced time-clock rules; changing your job assignments; eliminating all material handler positions, five maintenance helper positions, and our tool maker apprenticeship program; charging you for safety equipment and increasing the cost of replacement time cards; requiring that machines not be shut down at shift change; more strictly enforcing our break policy; disciplining you for contamination of regrind when no product is contaminated; disciplining machine operators for failure to properly complete paperwork associated with machine operation; requiring you, when questioned about a production matter, to give a response that a supervisor deems satisfactory notwithstanding the absence of any deficiency in your work; increasing the amounts employees pay for health insurance; and changing our requirements for obtaining approval of sick leave and vacation leave. The appropriate bargaining unit is:

> All hourly production associates, including maintenance associates, total shop associates, warehouse associates, quality assurance associates, secondary assembly associates, and leadpersons, but excluding office clerical employees, administrative employees, pro-

fessional and technical employees, temporary agency employees, and guards and supervisors as defined in the Act.

WE WILL NOT discharge you, suspend you, warn you, or otherwise change your terms and conditions of employment by making unlawful unilateral changes.

WE WILL NOT fail to give notice to, and bargain with, the Union regarding the effect on you of the institution of a continuous shift operation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the unilateral changes that we have made in your terms and conditions of employment by instituting and enforcing new timeclock rules and enforcing previously unenforced timeclock rules; changing your job assignments; eliminating all material handler positions; five maintenance helper positions, and our tool maker apprenticeship program; charging you for safety equipment and increasing the cost of replacement time cards; requiring that machines not be shut down at shift change; more strictly enforcing our break policy; disciplining you for contamination of regrind when no product is contaminated; disciplining machine operators for failure to properly complete paperwork associated with machine operation; requiring you, when questioned about a production matter, to give a response that a supervisor deems satisfactory notwithstanding the absence of any deficiency in your work; increasing the amounts you pay for health insurance; and changing our requirements for obtaining approval of sick leave and vacation leave.

WE WILL notify and give the Union an opportunity to bargain before making any changes in your terms and conditions of employment.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline we issued to you pursuant to our unlawful unilateral changes and, within 3 days thereafter, WE WILL notify you in writing that this has been done and that the discipline will not be used against you in any way.

WE WILL, within 14 days from the date of this Order, offer Tony Clark and Stephanie Sledge full reinstatement to their former job assignments and Thomas Ellis and Parthenia Rhodes full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Toney Clark, Rex Davis, Thomas Ellis, Parthenia Rhodes, and Virginia Vaughn for any loss of earnings and other benefits resulting from their discipline, less any net interim earnings, plus interest.

WE WILL reinstate all material handler positions, five maintenance helper positions, and the tool maker apprenticeship program.

WE WILL make whole employees who formerly worked in material handler positions, maintenance helper positions, and the tool maker apprenticeship program for any loss of earnings they suffered as a result of the Respondent's unlawful elimination of their job classifications, with interest.

WE WILL make whole all of you who were affected by the charges made for safety equipment and the increased cost of replacement timecards.

WE WILL make whole all of you who paid increased amounts for their health insurance as a result of our increasing the amount of health insurance premiums that you paid during 1997.

FLAMBEAU AIRMOLD CORPORATION